IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-321

Laclede Gas Company,

Petitioner,

v.

Federal Energy Regulatory Commission
and
Mississippi River Transmission Corporation

Respondents.

BRIEF OF MISSISSIPPI RIVER TRANSMISSION CORPORATION IN OPPOSITION TO GRANT OF A WRIT OF CERTIORARI

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September 27, 1979

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Respondent Mississippi River Transmission Corporation ("MRTC") hereby files in opposition to the petition for a writ of certiorari filed in this cause by Laclede Gas Company ("Laclede" or "Petitioner") on August 28, 1979.

QUESTION PRESENTED

Whether the United States Court of Appeals for the District of Columbia Circuit properly ruled that it lacked jurisdiction to review orders of the Federal Energy Regulatory Commission ("Commission")[1] issued as the result of authority delegated to it pursuant to the Emergency Natural Gas Act of 1977 ("ENGA"),[2] which act vests exclusive jurisdiction to review orders issued under it in the Temporary Emergency Court of Appeals ("TECA"), where the orders of the Commission properly made clear that it was judging the issues involved under the standards of ENGA and the ENGA Administrator's Order No. 7[3] and not under the standards of the Natural Gas Act ("NGA").[4]

STATEMENT OF THE CASE

MRTC is an interstate "natural gas company" as defined in the Natural Gas Act, subject to regulation by the Commission with respect to many of its activities. Laclede is MRTC's largest jurisdictional customer. MRTC purchases over half of its total gas supply from United Gas Pipe Line Company ("United"), another interstate pipeline regulated by the Commission, which had been sharply curtailing service because of a severe gas supply shortage on its system

[1]Hereinafter, the term "Commission" shall be read as referring both to the Federal Energy Regulatory Commission and its predecessor agency, the Federal Power Commission.

[2]Pub. L. No. 95-2, 91 Stat. 4 (1977).

[3]42 Fed. Reg. 22146 (May 2, 1977).

[4]15 U.S.C. § 717.

for a number of years even before the onset of the bitterly cold 1976–77 winter.

During 1977, United purchased natural gas supplies pursuant to the provisions of the ENGA and flowed the costs of these emergency purchases through to its customers (including MRTC) pursuant to the ENGA Administrator's Order No. 7. In Order No. 7, the Administrator prescribed precise procedures to be utilized by interstate pipelines for the recovery of ENGA costs and, in certain circumstances, permitted pipelines to select one of two specified methods of recovery. Having paid United its ENGA costs, MRTC then made a filing in strict conformity with the Administrator's Order No. 7 to flow-through to its customers (including Laclede) amounts it had paid United. Because of the cost recovery method employed by MRTC under the Administrator's Order No. 7, MRTC was required to set forth charges determined in accordance with Order No. 7 procedures in tariff sheet form and file the same with the Commission for review as to compliance with Order No. 7.

Laclede intervened and sought to have the Commission review MRTC's ENGA cost recoupment filing under the substantive and procedural standards of the Natural Gas Act and not under those of ENGA and the ENGA Administrator's Order No. 7. After various pleadings and counter pleadings, the Commission rejected Laclede's arguments, holding that MRTC's ENGA cost recoupment was governed by the provisions of ENGA and the Administrator's Order No. 7 and that the standards and procedures of the NGA were inapplicable. It further examined in detail MRTC's ENGA cost recoupment filing

and found that it was in strict conformity with the Administrator's Order No. 7. It denied Laclede's application for rehearing.

Laclede sought review before the United States Court of Appeals. The Court of Appeals held that the Commission orders in question were entered "under ENGA in aid of the President's delegated authority" and that, since jurisdiction to review suits concerning exercise of authority under ENGA is lodged solely in the TECA, it lacked jurisdiction to entertain Laclede's petition for review. It subsequently denied Laclede's petition for rehearing and its suggestion for rehearing *en banc*.

Laclede now seeks issuance of a writ of certiorari from this court.

REASONS FOR DENIAL OF THE WRIT

The Court should deny certiorari because, contrary to Laclede's assertions:

1. The ruling of the United States Court of Appeals in this proceeding is not in conflict with any prior ruling by this Court or the ruling of any United States Court of Appeals or TECA, including, particularly:

   A. *Lo-Vaca Gathering Co. v. Railroad Commission of Texas;* [5] and

   B. *S.E.C. v. Chenery Corp.* [6]

[5] 565 F.2d 144 (Em. App. 1977).

[6] 332 U.S. 194 (1957).

2. This case is limited to the particular facts involved herein and will have no significant precedential effect on any other proceeding, either present, past, or future.

3. Laclede, having sought judicial review in the wrong forum since it recognized it had no case under ENGA, should not now be heard to complain that it has been denied its right to judicial review.

1. The Ruling Of The Court Of Appeals In This Case Is Not In Conflict With Other Judicial Decisions.

Laclede (Petition, pp. 6-10) asserts that the ruling of the Court of Appeals in this case is in conflict with the decision of the TECA in *Lo-Vaca Gathering Co. v. Railroad Commission of Texas, supra,* and with the ruling of this court in *S.E.C. v. Chenery Corp., supra.* To the contrary, such holdings are entirely in accord.

A. Lo-Vaca Gathering Co. v. Railroad Commission of Texas

In *Lo-Vaca,* an order of the ENGA Administrator directed an intrastate gas company to transport natural gas and fixed the amount of compensation which the gas company was to be paid for rendering such transportation services. A state regulatory agency, exercising jurisdiction over the company's activities, subsequently issued an order directing the disposition of the revenues received for the transportation services by requiring the crediting of the revenues to existing customers. The company sought to have the state agency order set aside by the TECA on the

ground that it was in conflict with the order of the Administrator and that it thus fell within the ambit of Section 14 of ENGA (providing for the preemption of conflicting orders of state governments with respect to ENGA transactions). The TECA properly dismissed the complaint for lack of jurisdiction. In *Lo-Vaca,* the Administrator's order did not deal with the *disposition* of compensation once it had been paid to the company — it merely fixed the amount to be paid. The subject of the state agency's order was entirely different from, and obviously not in conflict with, that of the ENGA Administrator and, thus, the "preemption" provisions of ENGA were not called into play as claimed by the gas company. Additionally, the Administrator's order in that case did not delegate any authority to the state agency to discharge a function of the Administrator. Consequently, in *Lo-Vaca,* jurisdiction was found lacking under the preemption provisions of ENGA, and no claim could be made with respect to agency exercise of delegated authority under ENGA. Clearly, the TECA had no jurisdiction to review the complaint on any basis.

Unlike *Lo-Vaca,* however, in the instant case the ENGA Administrator's Order No. 7 specified in detail the mechanics for MRTC's ENGA cost recoupment and delegated to the Commission the limited authority to determine whether or not the proposed recoupment was in accord with the Administrator's Order. Thus, the Court of Appeals was asked in this case to review an action "under ENGA in aid of the President's delegated authority." [7] The Court of Ap-

[7]Order of the United States Court of Appeals for the District of Columbia Circuit issued April 19, 1979, in *Laclede Gas Company v. Federal Energy Regulatory Commission* (Petition, p. A-3).

peals properly held that the jurisdiction for such review was vested solely in the TECA. There is no conflict in this holding with that of *Lo-Vaca.* This case involves review of actions taken pursuant to authority lawfully delegated under ENGA; *Lo-Vaca* involved review of state agency action not preempted by any orders issued under ENGA.

While *Lo-Vaca* was concerned with the issue of jurisdiction under ENGA, it is inapposite to the instant case. *Lo-Vaca* related to the possible interplay between ENGA and a *state* agency order, and did not touch upon a point that is central to the decision which is being challenged here. In order to insure the effectiveness of ENGA, Congress deliberately and carefully insulated ENGA jurisdiction from any possible infringement by the existing *federal* regulatory scheme administered by the Commission under the NGA. This is evident from the legislative history of ENGA and from the provisions of ENGA itself. ENGA was a short-term, emergency measure designed to provide rapid solutions to the immediate crises created by the critical shortage of natural gas experienced during the 1976-77 winter. Congressional recognition that existing federal regulatory mechanisms were inadequate to provide the prompt responses necessary to ward off the imminent dangers to life and property then occurring pervades the legislative history of ENGA. [8] Congressional debate repeatedly relfected concern over the possibility that if jurisdiction under ENGA was not totally segregated from that under the NGA the substantial body of case law relating to both procedural and substantive matters under the NGA would be read into ENGA making it so cumber-

[8]cf. 123 Cong. Rec. S. 1559-1560 (daily ed. Jan. 28, 1977) (Remarks of Senator Stevenson).

some that the critical objectives of the temporary legislation could not be achieved.[9] Because of such concerns, Congress provided that ENGA be administered by the President rather than the Commission. By Executive Order No. 11969, 42 Fed. Reg. 6791 (Appendix A hereto), the President, in turn, delegated most of his powers under ENGA to the Chairman of the Commission. The delegation order also reflected the same appreciation for the need to insulate ENGA authority from NGA jurisdiction as was demonstrated by Congress; it provided (Section 1):

> "... Nothing in such delegation shall be construed as delegating such authority to the Federal Power Commission as a collective body, except insofar as the Chairman may further delegate his authority under Section 3 of this Order."

To provide the mechanics to be utilized by interstate pipelines for flowing through costs incurred under Section 6 of ENGA, the Administrator issued Order No. 7 which specified in detail the *only* methods which could be used for ENGA cost recovery. Such methods were not suggested, they were mandated, The applicable portions thereof are set forth as Appendix B hereto. Order No. 7 provided several

[9]cf. 123 Cong. Rec. S. 1668 (daily ed. Jan. 31, 1977) (Remarks of Senator Stevens):

> "... I fear that if this authority is delegated to the Federal Power Commission, which already has a basic due process fabric created in regulation, court decision, and other acts of Congress, there is a possibility that a court might determine that what we have intended under this act could not be achieved because of other acts, regulations, or court decisions."

methods for ENGA cost recoupment; and, in circumstances (such as United's and MRTC's) in which ENGA costs exceeded a stated proportionate level, Order No. 7 provided two methods for recoupment of such costs. Under the method utilized by United, pipelines were permitted to simply bill the costs directly to customers on a current basis. No filing was required at the Commission and in no manner was the Commission involved. Under the method used by MRTC, EGNA costs were billed over a longer period, with the charges to each customer being set forth on a tariff sheet filed with the Commission. In this latter instance, review for compliance with Order No. 7 was the only ENGA function delegated by the Administrator. He clearly did not contemplate, nor does Order No. 7 evidence any intent, that the Commission exercise any jurisdiction under the NGA. Order No. 7 was specific in its ENGA cost recoupment requirements; the Commission was not free either to authorize or direct the use of different, or even modified, cost recovery methods.

Grasping for a legal basis for its assertion that jurisdiction under the NGA is applicable here, Laclede says "[i]t is undisputed that the Administrator of ENGA issued no order respecting MRT's transactions" (Petition, pp. 6-7); and with this same rationale, Laclede claims (Petition, p. 8) that the explicit protection of Section 6(b)(1)(B) of ENGA (Petition, p. A-49) given to "any natural gas company" from the provisions of the NGA is applicable only if the Section 6 (sale or transportation) transaction "had been specifically approved by the Administrator." To imply that the provisions of ENGA are not applicable to MRTC merely because MRTC was not specifically named

in an Administrator's order is rediculous. The Administrator's Order No. 7 was an order of *general* applicability, prescribing procedures to be utilized by *all* interstate pipeline companies to flow-through ENGA costs; and, as such, it was certainly an order "respecting MRT's transactions" in this case. Additionally, Laclede's contention that ENGA's Section 6 restrictions on NGA jurisdiction are inapplicable because the transaction was not "specifically" authorized conveniently disregards the facts that United's purchases were authorized (Laclede has not claimed otherwise) and that, as noted by the Commission in its February 27, 1978 "Order Granting Rehearing," (Petition, p. A-23) the Administrator himself stated:

> ". . . When a transaction is made under that order, (Order No. 2 setting forth criteria for ENGA purchases) including all delivery or transportation arrangements, *whether or not covered by an express authorization of the Administrator in a specific order,* the transaction shall be deemed to be 'authorized' and 'ordered' for purposes of Section 6 and 9 of the Act." (Emphasis and parenthetical supplied)

In the Commission orders complained of by Laclede, the Commission made a thorough and well-reasoned analysis of its authority to deal with MRTC's ENGA cost recoupment. It found that ENGA and the ENGA Administrator's Order No. 7 were applicable to MRTC's ENGA cost recoupment. It found that, as a result, its authority with respect to MRTC's ENGA cost recoupment

filing was limited to a determination as to whether or not it conformed with the ENGA Administrator's Order No. 7. It carefully scrutinized MRTC's filing and found it to be in strict compliance with Order No. 7. Laclede's contentions are, at best, collateral attacks on Order No. 7 and upon ENGA itself. [10]

There simply is no factual or legal basis whatever for a claim that the Court of Appeals decision herein conflicts with the *Lo-Vaca* decision, and Laclede's claim of conflict is a "bookstraps" exercise.

B. S.E.C. v. Chenery Corp.

Laclede asserts (Petition, p. 11) that the Court of Appeals' ruling is in conflict with *Chenery, supra,* in that the Court ascribed a legal basis for the Commission's action in this case different from that stated by the Commission. Laclede's assertion is completely erroneous.

Laclede claims that the Commission stated that it had acted under the NGA. Throughout the two Commission orders complained of by Laclede, the Commission made clear that it was limited to and applying the standards of ENGA and the Administrator's Order No. 7 thereunder (*see, e.g.,* Petition. pp. A-18-A-30, A-33-A-36). At no place

[10] In its zeal to get the Court's attention, Laclede has attempted to stigmatize MRTC's filing by twice using the now popular term "windfall profits." However, the use of this epithet in a proceeding respecting a filing which fully conformed with Order No. 7 is plainly inappropriate and improper. Laclede is really complaining about the operation of Order No. 7, even though the order's procedures resulted in the recovery not of "windfall profits," but only of ENGA gas costs that had actually been incurred.

in its orders did the Commission say that the provisions of the NGA were applicable to MRTC's ENGA cost recoupment. Likewise, the Commission's brief to the Court of Appeals made clear that it had been bound by and applied the standards of ENGA and the Administrator's Order No. 7 and not those of the NGA.

In its Petition herein, Laclede seizes upon the jurisdictional statement in the Commission's brief to the Court of Appeals as justifying a claim that the Commission acted under the NGA and not under ENGA, contrary to the clear import of the Commission's Orders in question and its brief in total. Laclede then claims that the Court of Appeals' ruling herein violates *Chenery, supra.* Laclede is wrong.

In *Chenery,* this Court stated (at pp. 196-197):

"When the case was first here, we emphasized a simple but fundamental rule of administrative law. That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency ****

"We also emphasized on our prior decision an important corollary of the foregoing rule. If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess

at the theory underlying the agency's action; nor can a court by expected to chisel that which must be precise from what the agency has left vague and indecisive. In other words, 'We must know what a decision means before the duty becomes ours to say whether it is right or wrong.' United States v. Chicago, M., St. P. & P. R. Co., 294 U.S. 499, 511, 55 S.Ct. 462, 467, 79 L.Ed. 1023."

In this case, the Commission fully complied with the requirements of *Chenery.* There could be no doubt from its orders that it held that it was bound by and applying the standards of ENGA and Order No. 7 promulgated thereunder, and not those of the NGA. Were such not the case the Commission could never have reached its conclusion "that under the circumstances of this case the Commission is without authority to suspend or disallow rates derived from authorized ENGA purchases calculated in accordance with the Administrator's Order No. 7." (February 27, 1978 "Order Granting Rehearing," see Petition, p. A-29).

Laclede attempts to convert a passing statement by appellate counsel in brief into a claim that the reviewing court ascribed a legal basis to the Commission's action different from that contained in the Commission's orders. MRTC submits that Laclede's attempt is nothing more than a reverse twist on the practice condemned by this Court in *Federal Power Commission v. Texaco, Inc., et al.,* 417 U.S. 380, 41 L.Ed. 2d 141, 94 S.Ct. 2315 (1974), where it stated:

"But as it is, we cannot accept Appellate counsel's post hoc rationalizations for agency

action; for an agency's order must be upheld, if at all, on the same basis articulated in the order by the agency itself."

Finally, it must be recognized that the "new legal basis" which Laclede claims the court has ascribed to the Commission's action involves the fundamental power of the court to hear the case. Laclede's claim appears to be that the Court of Appeals was somehow invested with jurisdiction simply because the Commission itself may not have asserted in its jurisdictional statement that the case arose under ENGA and that jurisdiction was thus lacking in the Court of Appeals. This claim is without legal basis. Regardless of isolated statements which may be pulled from the parties' briefs, it is a long settled and well established legal principal that:

". . . . the parties cannot confer on a federal court jurisdiction that has not been vested in the court by the Constitution and Congress. The parties cannot waive lack of jurisdiction, whether by express consent,[5] or by conduct,[6] nor yet even by estoppel.[7] The court, whether trial or appellate, is obliged to notice want of jurisdiction on its own motion . . . .

"This doctrine is embodied in the Federal Rules of Civil Procedure. Most defects are waived if the party fails to assert them at the time specified by the rules, but it is specifically provided that whenever it appears by suggestion of the parties or

otherwise that the court lacks jurisdiction of the subject mater, the court shall dismiss the action.'" (Footnotes omitted) [11]

Thus, the fact that this proceeding arose under ENGA and not under the NGA is binding on the Court of Appeals notwithstanding the claims of any party to the proceeding.[12] Accordingly, the Court of Appeals was obliged to dismiss the action for want of jurisdiction.

2. This Case Is Limited To The Particular Facts Involved Herein And Will Have No Significant Precedential Effect On Any Other Proceeding, Present, Past, Or Future.

As found by both the Commission and the Court of Appeals, this case is governed by the provisions of ENGA. ENGA was a short term, emergency measure designed to provide immediate relief from the dangers posed by the severe 1976-77 winter and the critical shortage of natural gas being experienced at that time, pending action on longer-term legislation dealing with the nation's energy problems. The emergency purchase authority granted by ENGA expired by the terms of the statute on August 1, 1977, and the Regulations promulgated thereunder since have been physically removed from the Code of Federal Regulations. To MRTC's knowledge, this is the only proceeding related to Commission orders dealing with the flow-through of costs incurred pursuant to the pro-

[11] Wright, *Fed. Courts*, 2d Ed. H.B., 3rd Reprint, 1973, pp. 15-16.

[12] *See also, Knee v. Chemical Leaman Tank Lines, Inc.*, 293 F.Supp. 1094 (1968).

visions of ENGA that has reached the appellate courts.

Attempting to obscure the fact that this case involves only the operation of ENGA and paint it as a case of lasting signficiance, Laclede claims (Petition, pp. 10-11) that the Court of Appeals' ruling will totally deprive ratepayers of any opportunity for judicial review of flow-through of costs of emergency gas under the Natural Gas Policy Act of 1978 ("NGPA"),[13] the Congress' long-term response to the natural gas shortage. The attempt is a failure.

Although Laclede points out the similarity of ENGA and NGPA with respect to emergency purchases, it ignores the basic difference in purpose and administratin of the two acts. ENGA was an emergency measure which provided for its total implementation and administration solely by the President or his delegate, not by the Commission. Conversly, the NGPA is a long range act which provides for implementation and administration primarily by the Commission, except with respect to emergency gas supply transactions which are to be administered by the President. It is *only* in these emergency situations that judicial review of actions taken under the NGPA is vested in the TECA.

Laclede contends (Petition, p. 11) that the juxtaposition of the TECA's holding in *Lo-Vaca* with that of the Court of Appeals' holding in this case effectively deprives ratepayers of judicial review of orders under the NGPA relating to flow-through of emergency gas purchase transactions under that Act. This argument is without merit. The NGPA has already resulted in more abundant interstate gas supplies, and it is highly questionable whether a nationwide

[13]Pub. L. No. 95-621 (1978).

gas supply emergency of the type and severity experienced during the 1976-77 winter will ever again occur. This being so, there is no way to determine whether the emergency powers given the President by the NGPA will ever be exercised. Additionally, if such powers are ultimately exercised, there is no way of determining the manner (*i.e.*, directly or through delegation) in which such will be done. Only in the coincidental situation that administration of NGPA emergency powers is structured identically with the administration of powers under ENGA could the Court of Appeals' ruling in this case be extended to emergency actions under the NGPA. Most significantly, however, as has been shown above, there is no conflict between the TECA's holding in *Lo-Vaca* and that of the Court of Appeals in this case — if the action sought to be reviewed were that of the President, his delegate or sub-delegate, TECA is vested with exclusive review jurisdiction and, if not, review jurisdiction is vested in the Court of Appeals. The same would be true under the NGPA *if* the Court of Appeals' holding in this case were ever applicable. Consequently, contrary to Laclede's claim, the asserted "conflict" does not deprive any party of judicial review.

3. Laclede, Having Sought Judicial Review In The Wrong Forum Since It Recognized It Had No Case Under ENGA, Should Not Now Be Heard To Complain That It Has Been Denied Its Right To Judicial Review.

As above shown, the fundamental basis of Laclede's position both before the Commission and before the court has been that the Commission should have applied the

substantive and procedural standards of the NGA and not those of the ENGA. Had Laclede filed its petition for review in the TECA, it would have been admitting that the case was governed by ENGA, and not the NGA. Thus, tactically, the filing of its petition in the Court of Appeals gave color to its arguments.

Having elected to proceed in the wrong court for obvious reasons of strategy, Laclede should not now be heard to complain that it has been denied judicial review.

CONCLUSION

WHEREFORE, MRTC respectfully requests that the Court deny Laclede's petition for a writ of certiorari.

Respectfully submitted,

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September 27, 1979

CERTIFICATE OF SERVICE

I hereby certify that I have this day deposited in the mails, first class postage prepaid, a copy of the attached brief of Mississippi River Transmission Corporation addressed to each of the following:

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Dated at Washington, D.C. this 27th day of September, 1979.

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APPENDICES

APPENDIX A

Executive Order No. 11969, Administration of the
Emergency Natural Gas Act of 1977
February 2, 1977

THE PRESIDENT

Executive Order 11969 February 2, 1977

Administration of the Emergency Natural Gas Act of 1977

By virture of the authority vested in me by the Constitution and statutes of the United States of America, including Section 19 of the Emergency Natural Gas Act of 1977 (Public Law 95-2), and Section 301 of Title 3 of the United States Code, and as President of the United States of America, it is hereby ordered as follows:

Section 1. There is hereby delegated to the Chairman of the Federal Power Commission, hereafter the Chairman, all of the authority vested in the President by the Emergency Natural Gas Act of 1977, except for the authority to declare and terminate a natural gas emergency pursuant to Section 3 of said Act. Nothing in such delegation shall be construed as delegating such authority to the Federal Power Commission as a collective body, except insofar as the Chairman may further delegate his authority under Section 3 of this Order.

Sec. 2. The Chairman shall, to the extent he deems appropriate, consult with the Secretary of the Interior, the Administrator of the Federal Energy Administration, other members of the Federal Power Commission and the heads of other Executive agencies in exercising the authority delegated to him by this Order.

Sec. 3. All authority delegated to the Chairman by this Order may be further delegated, in whole or in part, by the

Chairman to any other officer of the United States or to any Executive agency.

Sec. 4. The heads of all Executive agencies shall cooperate with and assist the Chairman in carrying out the authority delegated to him by this Order.

Sec. 5. All Executive agencies shall, to the extent permitted by law, provide the Chairman on request such administrative support and information as may be necessary to carry out the authority deleged to him by this Order.

Jimmy Carter

The White House,
February 2, 1977.

[FR Doc. 77-3906 Filed 2-3-77; 12:01 pm]

FEDERAL REGISTER, VOL. 42, No. 24-Friday,
February 4, 1977

APPENDIX B

Relevant Provisions Of Order No. 7
Issued By The Administrator,
Emergency Natural Gas Act of 1977
April 22, 1977

RELEVANT PROVISIONS OF ORDER NO. 7 ISSUED BY THE ADMINISTRATOR, EMERGENCY NATURAL GAS ACT OF 1977
April 22, 1977

"Pursuant to Section 7 of the Act and the authority granted to me by the President in Executive Order No. 11969 (February 2, 1977), Part 1000 of Chapter X of Title 18 of the Code of Federal Regulations is amended by adding a new section 1000.9 as follows:

1000.9 ALLOCATION OF CHARGES FOR EMERGENCY PURCHASES

* * * * *

(d) Section 6 gas purchased for system supply shall be allocated to all customers in proportion to system volumes purchased by each customer during the applicable billing period. The charges for such volumes shall be billed pursuant to paragraph (e) below.

(e) The following billing procedures may be utilized by interstate pipeline companies to flow-through all authorized costs[12] of ENGA purchases pursuant to Section (6) of the Act:

(1) If the purchases are 2.0 percent or less of an interstate pipeline company's total purchases for the monthly billing period as forecasted in its September 1976 FPC Form No. 16 for the months

---

[12]Refers to purchases authorized by the Administrator or consistent with the guidelines laid down by the Administrator in various orders. (Footnote in Order)

of February and March 1977 and for ensuing months its April 1977 Form No. 16, the interstate pipeline company is authorized by the Administrator to seek FPC approval to use its effective FPC PGA tariff provision to flow the allocable jurisdictional costs through to its jurisdictional customers.

(2) If an interstate pipeline company's monthly ENGA purchases exceed 2.0 percent of its forecasted monthly sales in its September 1976 FPC Form No. 16 for the months of February and March 1977 and for ensuing months its April 1977 FPC Form No. 16, alternate billing options are available to the company. ENGA purchases would be allocated pro rata to its customers and storage on the basis of total sales and general system storage injections for the billing month and may be recovered as follows:

(i) The company may utilize the procedure set forth in FPC Docket No. RM77-10 which provides for notification of the costs of ENGA gas allocated to each customer on the billing date following delivery and recovery of the costs in the following monthly billing; or

(ii) The company may elect to bank the ENGA costs allocated to each customer through July 31, 1977. These banked costs, plus carrying costs computed at nine (9) percent per annum, would be recovered from each customer over an

eleven month period beginning October 1, 1977 and ending August 31, 1978. Individual surcharges for each customer would be computed by dividing each customer's banked costs by each customers forecasted eleven month sales included in the pipeline company's September 1977 FPC Form No. 16.

(3) If an interstate pipeline company elects to utilize the revenue recovery procedures provided in 2(ii) above, each individual surcharge will remain in effect until the interstate pipeline company recovers banked costs, plus applicable carrying charges. These individual surcharges should be set forth on a tariff sheet filed with the FPC."